

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Children, Families, and Elder Affairs Committee

BILL: SB 648

INTRODUCER: Senator Fasano

SUBJECT: Public Records and Meetings

DATE: February 12, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ray	Walsh	CF	Favorable
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 648 is the public records exemption companion to Senate Bill 746. The bill creates a public records exemption for identifying information of a donor or prospective donor to a direct support organization assisting the Department of Elder Affairs (DOEA). It also creates a meetings exemption for those portions of meetings of the direct support organization at which such exempt information is discussed. The provisions of this bill are subject to the Open Government Sunset Review Act.

This bill creates s. 430.82, F.S., relating to a direct support organization.

II. Present Situation:

Public Records

Florida has a long history of providing public access to government records. The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted:

”. . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.”¹

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

¹ *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

(a) Every person³ has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . .

Unless specifically exempted, all agency⁴ records are available for public inspection. The term “public record” is broadly defined to mean:

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁶

Only the Legislature is authorized to create exemptions to open government requirements.⁷ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁸ A bill enacting an exemption⁹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁰ A bill creating an exemption must be passed by a two-thirds vote of both houses.¹¹

The Public Records Act¹² specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

² Article I, s. 24 of the State Constitution.

³ Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

⁴ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ Article I, s. 24(c) of the State Constitution.

⁸ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

⁹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁰ Art. I, s. 24(c) of the State Constitution.

¹¹ *Id.*

¹² Chapter 119, F.S.

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.¹³ If requested, the records custodian must state the basis for the exemption, in writing.¹⁴

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.¹⁵ If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁶ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁷

It should be noted that the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

The Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁸ provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

¹³ Section 119.07(1)(b), F.S.

¹⁴ Section 119.07(1)(c) and (d), F.S.

¹⁵ *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

¹⁶ *Id* at 53; see also, Attorney General Opinion 85-62.

¹⁷ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁸ Section 119.15, F.S.

- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- [p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁹

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Department of Elder Affairs Direct-support Organization

Separate legislation (SB 746) provides for the establishment of a direct-support organization to assist DOEA in performing its mission.

Florida Statutes provide for the establishment of direct-support organizations as a means to assist state agencies in accomplishing their missions. Direct-support organizations are established as a Florida corporation not for profit incorporated under Chapter 617, F.S., and approved by the Department of State. According to Florida Statutes, the term “corporation not for profit” means a corporation no part of the income or profit of which is distributable to its members, directors, or officers.”²⁰

Direct-support organizations perform a variety of services to state agencies including:

- Raising money;
- Submitting requests for and receiving grants from the federal government, the state or its political subdivisions;
- Receiving, holding, investing, and administering property; and
- Making expenditures for the benefit of the supported agency.²¹

Direct-support organizations have been established to support a wide array of services and agencies including child abuse prevention and adoption; tourism; public guardianship; victims of crime; universities, community colleges, and school districts; the Florida National Guard; the

¹⁹ Section 119.15(4) (b), F.S.

²⁰ Section 617.01401(5), F.S.

²¹ Sections 39.0011, 250.115, 267.1732, 267.1736, 288.1226, 570.903, 744.7082, 944.802, 960.002, 985.672, 1001.453, 1004.28, 1004.70, and 1009.983, F.S.

Departments of Corrections, Juvenile Justice, and Agriculture and Consumer Services; and the Florida Prepaid College Board.²²

Florida Statutes generally require direct-support organizations to:

- Operate under written contract with the supported agency;
- Be governed by a board of directors; and
- Operate for the benefit of and in a manner consistent with the goals of the agency and in the best interest of the state.

III. Effect of Proposed Changes:

This bill makes the identity of a donor or prospective donor to the direct-support organization assisting DOEA, at the donor's request, confidential and exempt from the provisions of s. 119.07(1), F.S., and Article I, s. 24(a) of the Florida Constitution. The bill also provides an exemption for portions of meetings of the direct-support organization during which the identity of the donors or prospective donors is discussed.

The bill provides the exemption will be repealed on October 2, 2014, unless reviewed and saved from repeal by the legislature.

The bill provides for an effective date of July 1, 2009 contingent upon SB 746 or similar legislation passing during the same Legislative session and becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill provides for a public records exemption granting requested anonymity to donors or prospective donors to a direct-support organization assisting DOEA.

The direct-support organization, while a not-for-profit corporation, is authorized by law, the board members are appointed by the secretary of the department, and the sole purpose of the direct-support organization is to provide support for statutorily-delegated functions of the department. As such, the direct-support organization is "acting on behalf of" the department, meets the definition of an "agency" pursuant to s. 119.011(2), F.S., and is subject to open records and meetings requirements under Florida law.²³ Unless an exemption for records of the direct-support organization exists, any one may inspect and copy those records. Further, as the direct-support organization is an arm of the

²² *Id.*

²³ See, e.g., AGO 94-34 and AGO 95-17; see, also, *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc.*, 695 So.2d 418 (Fla. 5th DCA 1997).

department (“agency acting on behalf of”), the department has access to records of the direct-support organization that are exempt or confidential and exempt.

Further, s. 11.45(3)(d), F.S., provides that the Auditor General may, pursuant to his or her own authority, or at the direction of the Legislative Auditing Committee, conduct audits or other engagements as determined appropriate by the Auditor General of the accounts and records of any direct-support organization or citizen support organization created or established by law. The Auditor General is authorized to require and receive *any* records from the direct-support organization or citizen support organization, or from its independent auditor.

Further, where an entity is authorized to receive confidential and exempt information from the custodian of that information, the receiving entity is under the same obligation as the custodian to maintain the confidentiality of that information.²⁴

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill is tied to SB 746 and is contingent upon that bill or similar legislation becoming law.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

²⁴ See, *Ragsdale v. State*, 720 So.2d 203, 206(Fla. 1998); *Alice P. v. Miami Daily News, Inc.*, 440 So. 2d 1300 (Fla. 3d DCA 1983), review denied, 467 So. 2d 697 (Fla. 1985); see, also, AGO 04-44.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
